IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 7, 2004 Session

SUNIL KAWATRA v. NEELAM MANTRI KAWATRA

Appeal from the Chancery Court for Sumner County
No. 99D-343 Tom E. Gray, Chancellor

No. M2003-01855-COA-R3-CV - Filed August 31, 2004

This is a post-divorce parental relocation case. The Mother, who was the primary residential parent, gave notice to the Father of her plans to relocate to California with the minor child. Upon receiving this notice, the Father petitioned the court to prevent the removal of the child from the State of Tennessee. Following a bench trial, the trial court granted the Father's petition and determined that the child was spending substantially equal intervals of time with each parent pursuant to Tenn. Code Ann. § 36-6-108(c), and that the child's best interest would be served by remaining in Tennessee. The trial court denied the Father's request for attorney fees. Both parties appealed. We find that the trial court applied an incorrect legal standard in determining whether the parties actually spent substantially equal intervals of time with the child and, therefore, we reverse the trial court's judgment regarding relocation and affirm the trial court's decision denying the Father's request for attorney fees.

Tenn.R.App.P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Reversed in Part; Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Alfred H. Knight, Tyree B. Harris IV, and Alan D. Johnson, Nashville, for Appellant Neelam Mantri Kawatra.

Robert G. Ingrum, Gallatin, for Appellee Sunil Kawatra.

OPINION

I. Factual Background

The parties were divorced by the court's final decree on April 19, 2001. The parties' marital dissolution agreement ("MDA"), incorporated in the court's decree, provided for joint custody of

the parties' only child. Neelam Mantri Kawatra ("Mother") was designated as the primary residential custodian of the child. Sunil Kawatra ("Father") was granted visitation every other weekend from Friday at 6:00 P.M. until Sunday at 6:00 P.M.; every Wednesday afternoon and evening until Thursday morning at 8:00 A.M. for the months of September through May; six full weeks in the summer; and every Father's Day. The MDA provided that the parties would evenly split and alternate visitation for holidays. The parties later agreed to alternate visitation for the child's spring break from school.

Following the divorce, the Mother remarried and decided to relocate to California. The Mother notified the Father of her intended move and he filed a petition with the court seeking to prevent the relocation. After hearing proof, the trial court, applying Tennessee's parental relocation statute, Tenn. Code Ann. §36-6-108, calculated the number of hours each party "actually spent" with the child over the one-year period from June 2002 through May 2003. The court found that the child was "under the care and control of the school" for 1,187 hours. The court subtracted these 1,187 hours from the total hourly figure which it used as the denominator in calculating the percentage of time each parent spent with the child.

The trial court set forth its calculations and findings in this regard as follows:

> Utilizing 8,760 hours in a year, and subtracting 1,187 hours for the time the child was in school the Court finds direct care would be provided by the parents 7,573 hours. This means that the Father would be providing direct care 41.41% of the time and the Mother would be providing direct care 58.59% of the time.

The trial court found that the parties were spending substantially equal amounts of time with their child, and therefore concluded that Tenn. Code Ann. §36-6-108(c) was applicable to this case. The trial court then found that "it is in the best interest of the minor child that the child remain in Nashville[.]" Mother has appealed, arguing that the trial court erred by subtracting and discounting the child's school hours in calculating the parties' parenting time. Mother asserts that under the parental relocation statutory scheme, the trial court should have applied Tenn. Code Ann. § 36-6-108(d), and thereby, allowed her to relocate to California to live with her new husband and child. Father appeals the trial court's denial of his request for Mother to pay his attorney's fees.

II. Issues Presented for Review

The issues presented for our review in this case are as follows:

1. Whether the trial court erred in its application of Tenn. Code Ann. §36-6-108 by deducting from the total amount of time spent with her parents the hours the child spent in school.

2. Whether the court erred in determining that the parties were "actually spending substantially equal intervals of time with the child" pursuant to the statute.

3. Whether the court erred in denying Father's request for attorney's fees.

III. Standard of Review

In this non-jury case, our review is *de novo* upon the record of the proceedings below; but the record comes to us with a presumption of correctness as to the trial court's factual determinations which we must honor unless the evidence preponderates against those findings. Tenn. R.App. P. 13(d); *Wright v. City of Knoxville,* 898 S.W.2d 177, 181 (Tenn.1995); *Union Carbide Corp. v. Huddleston,* 854 S.W.2d 87, 91 (Tenn.1993). The trial court's conclusions of law, however, are accorded no such presumption. *Campbell v. Florida Steel Corp.,* 919 S.W.2d 26, 35 (Tenn.1996); *Presley v. Bennett,* 860 S.W.2d 857, 859 (Tenn.1993).

IV. The Parental Relocation Statute: "Substantially Equal Intervals of Time"

In 1998, the Tennessee Legislature enacted Tenn. Code Ann. § 36-6-108 to provide a framework for determining whether a primary residential parent should be allowed to move to another city or state with the minor child. The statute created a presumption in favor of the relocating custodial parent who spends a greater amount of time with the child. *Elder v. Elder*, 2001 WL 1077961 at *6, 2001 Tenn. App. LEXIS 681, C/A No. M1998-00935-COA-R3-CV (Tenn. Ct. App. M.S. filed Sept. 14, 2001). Under the statute, when a divorced parent desires to relocate with his or her child outside the State of Tennessee or more than one hundred miles from the other parent within the state, and the other parent opposes the move, the trial court is required to make a determination as to whether the parents are spending substantially equal intervals of time with the child. If the parents are actually spending substantially equal amounts of time with the child, then Tenn. Code Ann.§36-6-108(c) applies, and the trial court must determine whether permitting the relocation is in the child's best interest. If, however, the trial court determines that a parent's actual time with the child is not substantially equal to that of the primary residential parent, then the court applies Tenn. Code Ann. §36-6-108(d) and the trial court is required to permit the primary residential parent to move unless the other parent can prove (1) that the move does not have a reasonable purpose, (2) that the move poses a specific and serious harm that outweighs the harm resulting from the change of custody, or (3) that the primary residential parent's decision to move is vindictive. The parent opposing the relocation has the burden of proving one or more of these circumstances and the considerations of the child's best interest do not come into play until at least one of these circumstances is shown to exist. *Elder v. Elder, supra, Helton v. Helton,* 2004 WL 63478 at * 7, 2004 Tenn. App. LEXIS 20, C/A No. M2002-02792-COA-R3-CV(Tenn. Ct. App. filed Jan. 13, 2004).

Tenn. Code Ann. §36-6-108 provides in pertinent part as follows regarding this inquiry:

> (c) If the parents are actually spending substantially equal intervals of time with the child and the relocating parent seeks to move with the child, the other parent may, within thirty (30) days of receipt of notice, file a petition in opposition to removal of the child. No presumption in favor of or against the request to relocate with the child shall arise. The court shall determine whether or not to permit relocation of the child based upon the best interests of the child.
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> * * *
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> (d) If the parents are not actually spending substantially equal intervals of time with the child and the parent spending the greater amount of time with the child proposes to relocate with the child, the other parent may, within thirty (30) days of receipt of the notice, file a petition in opposition to removal of the child. . .The parent spending the greater amount of time with the child shall be permitted to relocate with the child unless the court finds:
>
> (1) The relocation does not have a reasonable purpose;
>
> (2) The relocation would pose a threat of specific and serious harm to the child which outweighs the threat of harm to the child of a change of custody; or
>
> (3) The parent's motive for relocating with the child is vindictive in that it is intended to defeat or deter visitation rights of the non-custodial parent or the parent spending less time with the child.

Tenn. Code Ann. § 36-6-108(c) and (d).

Therefore, the determination as to whether the parents are spending substantially equal intervals of time with the child, or greater time with the child, becomes the threshold determination. The question then arises as to how the hours should be calculated, and then once calculated, what percentage of time will be called substantially equal. In this case, we believe that the trial court erred in deducting school time from the calculation of the time spent with each parent, since the responsibility of a parent does not end while the child is at school.

In *Clark v. Clark*, 2003 WL 23094000, 2003 Tenn.App. LEXIS 926, C/A No. M2002-03071-COA-R3-CV (Tenn. App. M.S. filed Dec. 30, 2003), the court in considering whether to deduct the child's sleeping hours and calculate only his or her "waking hours," reasoned as follows:

> There are no cases in which the courts of this state have approved of a comparison of custodial time based upon waking hours only. . .
>
> There is no mention of waking hours in Tenn.Code Ann.§ 36-6-108.

> Further, *the responsibilities of a parent do not end when the children go to sleep or when they are in school*. In this case, Ms. Clark testified that her older daughter frequently awakens during the night when she has stomach problems. Her younger daughter sometimes awakens with aching legs from growing pains. When this occurs, the mother must herself awaken to take care of the girls. *Similarly, when the girls are in school, it is the mother who has to leave work to pick them up when they are sick, or bring them a lunch they have forgotten, or a pair of tennis shoes they will need for gym.*
>
> In sum, we see no reason to adopt the "waking hours" methodology proposed by Mr. Clark either as a general principle or for the purposes of this particular case.

Clark v. Clark, 2003 WL 23094000 at *5 (emphasis added); *see also Collins v. Coode*, 2004 WL 904097 at *2, 2004 Tenn.App. LEXIS 267, C/A No. M2002–02557-COA-R3-CV (Tenn.App. M.S. Apr.27, 2004), noting "[t]his court has consistently declined to approve various "rounding-up" theories proposed by non-residential parents to inflate the amount of time they have spent with their children."

We agree with the reasoning of the *Clark* court, and we likewise find no reason to adopt a methodology which deducts a child's school hours in making a calculation of "total time spent" under Tenn. Code Ann. §36-6-108. As with sleep time, the responsibility of a parent does not end when a child goes to school.

Regarding Father's visitation time, the parties agreed that Father exercised all of the visitation granted him. The trial court held that "using the testimony of the Father and Mother that he utilized all visitation awarded to him and the exhibits and the Final Decree of Divorce. . . the Court finds that the Father had parenting time this last year (June 1, 2002 to May 31, 2003) totaling 3,136 hours." Mother argues that the court made several mathematical errors in its calculation, and improperly gave Father "double credit" for some overlapping times of holidays which were also Father's visitation weekends. According to Mother's calculations, the correct number of hours Father spent with the child was 2,794.5. Father submitted, as an appendix to his brief, a schedule documenting every hour of his visitation "actually exercised" during the year examined by the court, and a "summary of actual visitation" which stated he actually spent 3,159 hours with the child.[1]

We have reviewed the visitation schedule set forth by the decrees of the court, a calendar, and the trial court's math, and its figure of 3,136 hours appears substantially accurate. Even accepting, solely for purposes of argument, Father's figure of 3,159 hours, this amounts to 36% of the total 8,760 hours in a year.[2] The question then becomes whether the parents spent substantially equal intervals of time under the parental relocation statute. We determine that the parents were not spending

[1] It does not appear that Father submitted this information in this form to the trial court.

[2] Using the trial court's figure of 3,136 hours does not significantly change the percentage of time spent; with that figure the percentage would be 35.8%.

substantially equal intervals of time. The statute does not define the term "substantially equal." In the recent unreported case of *Collins v. Coode, supra*, the court stated as follows regarding the "substantially equal" determination:

> The word "substantially" means "essentially," "to all intents and purposes," or "in regard to everything material." 17 OXFORD ENGLISH DICTIONARY 68 (2d ed.1989). Thus, the plain meaning of the term "substantially equal" connotes a relationship that is very close to equality--so close that it may be considered equal.
> The courts have not provided bright-line rules for determining whether parents are spending "substantially equal" custodial time with their children. As convenient as a bright-line rule might be, we see no need to adopt one because custody decisions, by their very nature, are inherently fact-dependent. Courts must have flexibility to consider the parents as they find them. However, courts called upon to determine whether parents are spending substantially equal amounts of time with their children should consider, among other things: (1) the terms of the applicable custody and visitation orders, (2) the number of days each parent has actually spent with the child or children, (3) whether the parents are using the full amount of residential time provided them, (4) the length of the period during which the comparison of residential time is being made, and (5) the particular exigencies of the parent's circumstances.

Collins v. Coode, 2004 WL 904097 at *3 (Tenn.App.2004)(footnotes omitted).

Tennessee appellate courts have construed Tenn. Code Ann. §36-6-108's use of the term "substantially equal" on several occasions. This Court has twice held that a split of custodial parenting time which approximated 60%–40% was not substantially equal. *Connell v. Connell*, 2000 WL 122204, 2000 Tenn.App. LEXIS 28, C/A No. 03A01-9808-CV-00282 (Tenn.App.E.S. filed Jan. 25, 2000); *Branham v. Branham*, 2004 WL 716729, 2004 Tenn.App. LEXIS 200, C/A No. E2003-01253-COA-R3-CV (Tenn.App.E.S. filed Apr.2, 2004, *petition to rehear granted* May 5, 2004). On two occasions, the parties agreed that they spent substantially equal amounts of time with the child or children. *Wilson v. Wilson*, 58 S.W.3d 718, 727 (Tenn.App. 2001); *Woolman v. Woolman*, 2001 WL 1660714, 2001 Tenn. App. LEXIS 930, C/A No. M2000-02346-COA-R3-CV (Tenn.App.W.S. filed Dec.28, 2001). In the case of *Monroe v. Robinson*, 2003 WL 132463 at *3-4, 2003 Tenn.App. LEXIS 34, C/A No. M2001-02218-COA-R3-CV (Tenn.App.W.S. filed Jan.16, 2003), the court affirmed the trial court's finding that a split of approximately 57%–43% was substantially equal. Finally, in *Collins v. Coode, supra,* the court found a split of 33.2%–67.8% was not substantially equal under the statute. 2004 WL 904097 at *4.

In this case, as above noted, even giving Father the benefit of every doubt for argument's sake, the parenting time split is 36%–64%. On a daily basis, this translates to 131.4 days with Father and

233.6 days with Mother. We cannot say that this division of time, with Mother spending over one hundred days more custodial parenting time with the child than Father in a year, is substantially equal. Consequently, the applicable subsection of the statute in this case is §36-6-108(d).

The trial court made specific findings that "the Mother's relocation does have a reasonable purpose and there is no evidence of specific or serious harm to the child if the child relocates with the Mother. The Mother's motive for relocating is not vindictive." These findings are supported by the record and are not challenged by Father on appeal. The record shows that Mother's motive and purpose for moving is to live with her new husband. Absent a finding of an unreasonable purpose for the relocation, a threat of specific and serious harm to the child, or a vindictive motive for moving, Tenn. Code Ann. §36-6-108(d) mandates that the parent spending the greater amount of time shall be permitted to relocate with the child.

We are not without sympathy in this case for Father, who by all indications has been an excellent and devoted parent, and for whom it will undoubtedly be difficult to be separated from his child by such a long distance. However, when parents decide to divorce, they relinquish the marital privilege of jointly raising their children, and it often falls to the courts, as guided by the legislature, to make the difficult decisions apportioning the child-raising responsibilities between them. *Elder v. Elder,* 2001 WL 1077961 at *6, 2001 Tenn.App. LEXIS 681, C/A No. M1998-00935-COA-R3-CV (Tenn.App.M.S. filed Sept.14, 2001). We are obliged to apply the parental relocation statute as written.

V. Attorney's Fees

Father argues that the trial court erred by not awarding him attorney's fees. The decision whether to award attorney's fees is within the sound discretion of the trial court and will not be disturbed upon appeal unless the evidence preponderates against such a decision. *Kincaid v. Kincaid,* 912 S.W. 2d 140, 144 (Tenn. Ct. App. 1995). We find that the trial court's decision regarding attorney's fees is appropriate and the evidence does not preponderate against its decision.

VI. Conclusion

We affirm the trial court's decision requiring each party to pay his or her own attorney's fees. For the aforementioned reasons, we reverse the court's decision disallowing Mother to relocate to California with the child, pursuant to Tenn. Code Ann. §36-6-108(d). This case is remanded for such action by the trial court as may be necessary, consistent with this opinion, and for collection of costs below. Costs on appeal are assessed to the Father, Sunil Kawatra.

SHARON G. LEE, JUDGE